WISMA SIME DARBY SDN. BHD.

v.

WILSON PARKING MALAYSIA SDN. BHD.

COURT OF APPEAL, KUALA LUMPUR
DATO' SITI NORMA YAAKOB JCA
DATO' V.C. GEORGE JCA
DATO' AHMAD FAIRUZ SHEIKH ABDUL HALIM J
[CIVIL APPEAL NO: W-02-76-1994]
12 OCTOBER 1995

CONTRACT: *Option clause - Tenancy agreement - Option to renew tenancy with rent to be agreed - Option exercised within time - No agreement on rental for new term - Effect of option clause - Consideration of King's Motors (Oxford) Ltd. v. Lax - Whether valid tenancy agreement concluded - Whether agreement bad for uncertainty.*

LANDLORD & TENANT: *Option to renew tenancy - Rent to be agreed - Option exercised within time - No agreement on new rental - Effect of option clause - Whether tenancy agreement concluded - Whether tenants holding over - Consideration of King's Motors (Oxford) Ltd. v. Lax - Whether Court can ascertain the rent for the parties - Tenants upgrading equipment on premises upon landlord's instructions - Whether landlord estopped from denying the renewed tenancy.*

CIVIL PROCEDURE: *Appeal - Summary judgment - Exercise of option clause in tenancy agreement - No agreement on rental for new term - Whether there was a concluded tenancy agreement for a further term - Whether the Court could ascertain the rent for the parties - Whether estoppel applicable against the landlord - Whether a proper case for summary judgment.*

The appellants were the proprietors of the Wisma Sime Darby Carpark and the landlords of the respondents, Wilson Parking, who were operating car parking facilities under a tenancy agreement which also provided for an option to renew the tenancy for a further three years. By letter dated 11 October 1993, the respondents exercised their option within the period stipulated in the said agreement and upon the appellants' enquiry, proposed an increase in the rent for the new term. In the meantime, they commenced installation of new parking equipment as required by the appellants. Following discussions, the respondents increased their offer but were informed that the appellants were inviting tenders for the tenancy of the carpark from other parties. The respondents duly submitted their tender but the same was rejected. Thereafter, the existing lease was extended till the end of March 1994 to enable the respondents to wind up the car park operations and to give up vacant possession.

In a change of position, the respondents claimed that as they had exercised the option within the requisite period there was in fact a concluded tenancy agreement for another three years from 1st March 1994. The appellants then sought a declaration that the respondents' tenancy had been lawfully determined and for consequential orders including vacant possession and damages. The appellants filed two summons, the first of which was an injunction to restrain the respondents from obstructing the appellants from retaking possession of the premises and the other for summary judgment under O. 14 of the Rules of the High Court 1980. The respondents also filed a summons seeking to restrain the appellants from interfering with the respondents' continued occupation of the premises until the trial of the action or further order. The three summons were heard together and all were dismissed with costs. The plaintiffs/appellants appealed.

Counsel for the respondent submitted *inter alia* that there were conflicting judicial opinions in respect of the effect of the option clause and accordingly there ought to be a trial of the action. Further, since possession was in issue, the *status quo* should be maintained pending the trial. Counsel for the appellants submitted that all the material needed for the determination of the issues were before the Court and accordingly the matter was properly before the Judge for summary disposal. He further submitted that the option clause herein was similar to the option clause in *King's Motors (Oxford) Ltd. v. Lax* [1969] 3 All ER 665 and that on the strength of that judgment, the learned Judge should have held that there was no concluded agreement between the parties and therefore the respondents were holding over.

Respondent's Counsel argued that the clause in *King's Motors* had to be distinguished from the option clause in the instant case in that there was a requirement in the *King's Motors'* clause for agreement to be arrived on the rent for the new term **prior** to the expiration of the initial fixed term whereas in the present case there was no time limit provided in the option clause for agreement to be arrived at on the rental. It was submitted that in an option clause of the type in *King's Motors* and herein, the Court should imply that the parties had in mind that the rental for the new term should be "fair and reasonable rent" and if the parties cannot agree on the rent, the Court would decide for them what such rent is. He submitted that the Court would not allow a commercial agreement to go under for want of certainty. Counsel also stated that the appellants were estopped from taking the position that there was no renewal of the tenancy as reliance had been placed on the appellants' representations that it was not their policy to change car park operators and that the appellants had required the respondents to upgrade their equipment and propose a better system of traffic flow.

The main issue was whether there was in fact a concluded agreement between the parties for a further three years in respect of the tenancy.

Held:

Per V.C. George JCA (delivering the judgment of the Court):

[1] The rental for the renewal period of the tenancy had to be agreed by the parties. The agreement for renewal was executory and there was no machinery or formula for the Court to ascertain the rent if the parties could not come to an agreement on the rent. On authority and on principle the agreement to agree is bad for uncertainty. The Court cannot and should not make a bargain for the parties. There was no need for a trial to come to that conclusion.

[2] *King's Motors* restates an elementary principle and is not controversial. Further, it and the principle it stated having been given approbation by the Supreme Court in *Zainal Abidin v. Century Hotel Sdn. Bhd.*, the principle of *stare decisis* makes it mandatory for even the Court of Appeal to apply it.

[3] The respondents' Counsel's contention that it was implied that the appellants should have done all that was reasonably necessary to ensure that the parties reach an agreement is asking the Court to add yet another clause to the agreement. Neither the parties nor the Court may insist that the parties come to an agreement.

[4] The respondents believed and went about their business on the basis that there would be a renewal. That *per se* does not provide an estoppel in respect of such renewal and certainly not for the requirement that agreement be arrived at on rent. There has not been the sort of representation by or on behalf of the appellants in respect of which the respondents acted to their detriment that entitles the respondents to rely on estoppel.

[5] The appeal is allowed with costs. Consequently there should be judgment for the appellants in terms of prayers 1, 2 and 3 of the O. 14 application. There will be no order on the appellants' other summons-in-chambers save that costs thereof shall be paid by the defendants.

[Appeal allowed with costs; judgment for the appellants]

***[Bahasa Malaysia** Translation of Headnotes]*

***KONTRAK:** Fasal opsyen - Perjanjian sewaan - Opsyen untuk memperbaharui sewaan dengan persetujuan kepada sewa - Opsyen dilaksanakan dalam tempoh masa yang ditetapkan - Tidak terdapat perjanjian mengenai sewaan bagi tempoh baru - Kesan fasal opsyen - Pertimbangan bagi King's Motors (Oxford) Ltd. v. Lax - Samada perjanjian sewaan sah ditamatkan - Samada perjanjian tidak sah kerana ketidakpastian.*

TUAN-TANAH & PENYEWA: *Opsyen untuk memperbaharui sewaan - Sewa akan dipersetujui - Opsyen dilaksanakan dalam tempoh masa yang dihadkan - Tiada perjanjian atas kadar sewaan baru - Kesan fasal opsyen - Samada perjanjian sewaan muktamad - Samada penyewa bertangguh-tangguh - Pertimbangan bagi King's Motor (Oxford) Ltd. v. Lax - Samada Mahkamah boleh menentukan sewa bagi pihak-pihak - Penyewa mempertingkatkan peralatan pada premis atas arahan tuan-tanah - Samada tuan-tanah diestop daripada mempersoalkan sewaan yang diperbaharui.*

PROSEDUR SIVIL: *Rayuan - Penghakiman terus - Perlaksanaan fasal opsyen dalam perjanjian sewaan - Tiada perjanjian mengenai sewa bagi tempuh yang baru - Samada terdapatnya satu perjanjian yang selanjutnya - Samada Mahkamah boleh menentukan sewaan bagi pihak-pihak - Samada estopel terpakai terhadap tuan tanah - Samada merupakan satu kes yang wajar unutk penghakiman terus.*

Perayu merupakan tuanpunya Wisma Sime Darby Carpark dan tuan tanah bagi responden, iaitu Wilson Parking, yang menjalankan kemudahan-kemudahan meletak kereta di bawah satu perjanjian sewaan yang juga menperuntukkan satu opsyen untuk memperbaharui sewaan tersebut bagi tempuh 3 tahun yang selanjutnya. Melalui surat bertarikh 11 Oktober 1993, responden telah melaksanakan opsyen mereka dalam tempuh yang ditetapkan dalam perjanjian tersebut dan atas pertanyaan perayu, telah mencadangkan satu kenaikan pada kadar sewa bagi tempoh yang baru itu. Sementara itu, mereka telah mula memasang peralatan meletak kereta baru sepertimana yang dikehendaki oleh perayu. Berikutan dengan perundingm-perundingan yang diadakan, responden telah menaikkan tawaran mereka tetapi telah dimaklumkan bahawa perayu sedang mempelawa tawaran-tawaran bagi sewaan tempat meletak kereta tersebut daripada pihak-pihak yang lain. Responden telah mengemukakan tawaran mereka tetapi ianya telah ditolak. Berikutan itu, pajakan sedia ada telah dilanjutkan sehingga hujung bulan Mac 1994 bagi membolehkan responden menggulung operasi meletak kereta tersebut dan memberikan milikan kosong.

Dalam satu keadaan lain yang timbul, responden telah menuntut bahawa oleh kerana mereka telah melaksanakan opsyen tersebut dalam tempoh yang diperlukan, pada hakikatnya terdapat satu perjanjian sewaan muktamad bagi tempoh selama 3 tahun lagi daripada 1 Mac 1994. Perayu kemudiannya cuba mendapatkan satu pengisytiharan bahawa sewaan responden telah ditentukan dengan cara yang sah di sisi undang-undang dan bagi mendapatkan perintah-perintah yang berbangkit termasuk milikan kosong dan gantirugi. Perayu telah memfailkan dua saman, yang pertama daripadanya adalah satu injunksi untuk menegah responden dari menghalang perayu daripada mengambil milikan semula akan premis tersebut dan yang satu lagi untuk mendapatkan penghakiman terus di bawah A. 14 Kaedah-kaedah Mahkamah Tinggi 1980. Responden telah juga memfailkan satu saman memohon untuk menegah perayu daripada mengganggui

penghunian terus oleh responden akan premis itu, sehingga perbicaraan tindakan tersebut atau perintah yang selanjutnya. Ketiga-tiga saman itu telah didengar bersama-sama dan kesemuanya telah ditolak dengan kos. Plaintif/perayu telah merayui.

Peguam bagi pihak responden telah berhujah, antara lainnya, bahawa terdapat pertikaian dalam pendapat kehakiman berhubung dengan kesan fasal opsyen dan sehubungan itu haruslah terdapat satu perbicaraan terhadap tindakan tersebut. Selanjutnya, oleh kerana milikan merupakan satu isu, *status quo* haruslah dikekalkan sementara menantikan perbicaraan. Peguam bagi pihak perayu berhujah bahawa kesemua perkara yang diperlukan bagi penentuan isu-isu tersebut terdapat di hadapan Mahkamah, dan sehubungan itu, perkara-perkara tersebut yang berada di hadapan Hakim untuk penyelesaian terus adalah dalam keadaan yang teratur. Beliau selanjutnya berhujah bahawa fasal opsyen di sini adalah serupa dengan fasal opsyen yang terdapat dalam *King's Motors (Oxford) Ltd. v. La* [1969] 3 All ER 663 dan bahawa berdasarkan penghakiman yang kukuh itu, Hakim yang bijaksana seharusnya telah memutuskan bahawa tidak terdapat perjanjian muktamad antara pihak-pihak tersebut dan dengan itu responden telah melakukan perbuatan menangguh.

Peguam responden berhujah bahawa fasal dalam *King's Motors* haruslah dibezakan daripada fasal opsyen dalarn kes semasa ini, iaitu terdapat satu syarat dalam fasal *King's Motors* untuk mencapai persetujuan mengenai kadar sewa tersebut bagi tempuh yang baru sebelum penamatan tempuh awal yang telah ditetapkan itu, sedangkan dalam kes semasa ini, tidak terdapat had masa yang diperuntukkan dalam fasal opsyen tersebut untuk mencapai persetujuan mengenai kadar sewa tersebut. Ianya telah dihujahkan bahawa dalam sesuatu fasal opsyen seperti yang terdapat dalam *King's Motors* dan di sini, Mahkamah seharusnya bermaksud bahawa pihak-pihak tersebut membuat andaian bahawa kadar sewa bagi tempoh yang baru itu haruslah "fair and reasonable rent" (kadar sewa yang adil dan wajar) dan jika pihak-pihak tersebut tidak dapat bersetuju dengan sewa itu, Mahkamah akan memutuskan bagi mereka. Beliau berhujah bahawa Mahkamah tidak akan membenarkan satu perjanjian komersyial diketepikan kerana tiada kepastian. Peguam juga menyatakan bahawa perayu telah diestop daripada berpendirian bahawa tidak terdapat pembaharuan sewaan kerana responden telah bergantung pada pengemukaan perayu tersebut bahawa ianya bukan merupakan dasar mereka untuk menukar operator letak kereta dan bahawa perayu telah menghendaki responden untuk mempertingkatkan mutu peralatan mereka dan mencadangkan satu sistem perjalanan trafik yang lebih baik.

Isu utama adalah samada pada hakikatnya terdapat satu perjanjian muktamad antara pihak-pihak disini bagi tenpoh 3 tahun yang selanjutnya berhubung dengan sewaan tersebut.

Diputuskan:

Oleh V.C. George HMR (menyampaikan penghakiman Mahkanah):

[1] Kadar sewa bagi tempoh sewaan yang diperbaharui haruslah dipersetujui oleh pihak-pihak tersebut. Perjanjian untuk pembaharuan adalah eksekutori dan tidak terdapat mekanisme atau formula untuk Mahkamah menentukan kadar sewa jika pihak-pihak tidak dapat mencapai persetujuan atas sewa tersebut. Berdasarkan autoriti dan prinsip perjanjian untuk dipersetujui itu adalah tidak sesuai kerana tiada kepastian. Mahkamah tidak boleh dan tidak seharusnya membuat perhitungan bagi pihak-pihak tersebut. Perbicaraan tidak diperlukan untuk mencapai keputusan itu.

[2] *King's Motors* menyatakan semula satu prinsip asas dan yang tidak kontroversi. Selanjutnya, ianya dan prinsip yang dinyatakannya setelah diaprobat oleh Mahkamah Agung dalam *Zainal Abidin lwn. Century Hotel Sdn. Bhd.* prinsip *state decisis* menjadikannya mandatori untuk Mahkamah Rayuan sekalipun memakainya.

[3] Penegasan Peguam responden bahawa ianya telah tersirat bahawa perayu seharusnya melakukan apa yang dengan wajarnya perlu bagi memastikan bahawa pihak-pihak tersebut mencapai satu perjanjian adalah seumpama meminta Mahkamah untuk menambahkan satu lagi fasal kepada perjanjian itu. Mahkamah mahupun pihak-pihak tersebut tidak boleh menggesa supaya pihak-pihak tersebut mencapai satu persetujuan.

[4] Responden telah mempercayai dan terus menjalankan urusan mereka atas dasar bahawa satu pembaharuan akan dilakukan. Penbaharuan yang sedemikian per se tidak memperuntukkan satu estopel dan tentu sekali tidak juga memperuntukkan bahawa perjanjian berhubung dengan sewa tersebut dicapai. Tidak terdapat jenis representasi bagi pihak perayu berhubung dengan yang mana responden telah bertindak dengan cara yang menjejaskan yang memberi hak kepada responden untuk bergantung pada estopel.

[5] Rayuan dibenarkan dengan kos. Berikutan itu haruslah terdapat penghakiman untuk perayu berhubung dengan pohonan-pohonan 1, 2 dan 3 dari permohonan A. 14. Tidak akan terdapat apa-apa perintah atas saman dalam kamar perayu yang lain melainkan bahawa kos baginya akan dibayar oleh defendan.

[Rayuan dibenarkan dengan kos; penghakiman untuk perayu]

Cases referred to:

King's Motor (Oxford) Ltd. v. Lax [1969] 3 All ER 665 ***(foll)***

Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng @ Tan Tien Chi & Anor. [1995] 2 CLJ 713 ***(refd)***

Zainal Abidin v. Century Hotel Sdn. Bhd. [1987] 1 MLJ 236 ***(foll)***

Smith v. Morgan [1971] 2 All ER 665 ***(refd)***

Rothwell v. Wakeling [1975] 29 p and CR 234 ***(refd)***
Trustees of National Deposit Friendly Society v. Beatties of London Ltd. [1985] 2 EGLR 59 ***(refd)***
Corson v. Rhuddlan Borough Council [1990] 1 EGLR 20 ***(refd)***
Sudbrook Trading Ltd. v. Eggleton [1983] 1 AC 444 ***(refd)***
British Bank for Foreign Trade Ltd. v. Novine Ltd. [1949] 1 KB 623 ***(refd)***
Hillars & Co. v. Arcos [1923] 147 LT 503 ***(refd)***
Foley v. Classique Coaches [1934] 2 KB 1 ***(refd)***
Lewis v. Stephenson [1898] 67 LJ QB 296 ***(dist)***
Re Express Powers Ltd. Bank of Nova Scotia 73 DLR, 4th, 400, p. 403 ***(refd)***

For the appelants - Robert Lazar (Shanti Mogan with him); M/s. Shearn Delamore & Co.
For the respondents - Romesh Abraham (S.L. Goh with him); M/s. Shook Lin & Bok

JUDGMENT

V.C. George JCA:

The focal point on which this appeal turns is the effect of the option clause in the written three-year tenancy agreement dated 15 June 1991 in respect of the Wisma Sime Darby Car Park owned by the appellant landlord which the respondents, Wilson Parking, were occupying and operating as tenants and in respect of which *inter alia* they were to provide all necessary equipment for the smooth operation of the car parking facilities. The option clause is s. 8.07 which is as follows:

> **Section 8.07 - Renewal of Tenancy**
>
> The Landlord shall, on the written request of the tenant made three (3) months before the expiration of the term hereby created and if there shall not be at the time of such request any existing breach or non-observance of any of the covenants on the part of the tenant hereinbefore contained, grant to the tenant a tenancy of the Demised Premises **for a further term of three (3) years from the expiration of the said term at a rent to be agreed** but otherwise containing the like covenants and provisions as are herein contained with the exception of the present covenant for renewal. (emphasis added).

Wilson Parking had well within the three months before the expiration of the term of the tenancy, by its letter of 11 October 1993, exercised the option. They wrote to the appellant:

> **RE: Renewal of Tenancy Agreement Between Wisma Sime Darby Sdn. Bhd. and Wilson Parking (M) Sdn. Bhd. For The Wisma Sime Darby Car Park**
>
> In view of the expiring of the above tenancy agreement on 28 February 1994, we hereby give our notice to request you to renew for a further term of 3 years as stated in s. 8.07 of the tenancy agreement signed between Wisma Sime Darby Sdn. Bhd. and Wilson Parking (M) Sdn. Bhd. dated 15 June 1991.

Thank you.

Yours sincerely,
Wilson Parking (M) Sdn. Bhd.

Nothing was said about the rent for the proposed new term. However by its letter dated 30 November 1993 Wilson Parking in response to the appellants' enquiry as to what sort of rent the respondents had in mind, proposed that the rent for the new term be increased from the old rent of RM44,000 to RM48,000 per month.

In the meantime the respondents had on or about 10 November 1993 commenced the instalation of new parking equipment said to cost some RM45,000. The offer of RM48,000 was followed by meetings and discussions between the representatives of the parties resulting in the respondents by its letter of 15 January 1994 increasing their offer to RM54,000 a month. In response to this, the appellants by their letter of 2 February 1994 in effect informed the respondents that they were inviting others interested in taking over the tenancy of the car park to make offers and invited the respondents to make their offer in respect of the rental for the renewal of the tenancy in competition with the others who had been invited to tender for the tenancy. The letter ended with the appellants informing the respondents that "the company does not undertake to accept the lowest or any tender". The respondents, it would seem, went along with this proposal by the appellants and submitted their tender by their letter of 8 February 1994 (which it is to be noted referred to the appellants' said letter of 2 February 1994 inviting them to join in the tender exercise) and offered to "lease the Wisma Sime Darby car park in Jalan Raja Laut for a monthly rental of RM56,000".

The respondents' tender was not accepted. That of one Metro Parking (M) Sdn. Bhd., was accepted.

Thereafter the appellants extended the existing lease till the end of March 1994 obviously to enable the respondents to wind up the car park operations and give up vacant possession.

The respondents however now took the position that because they had exercised the option within the requisite period there was in fact a concluded tenancy agreement in respect of the car park for another three years from l March 1994. It was and is contended that there had been no agreement arrived at on rental, was not relevant. That the respondents were prepared to negotiate further on the rent, was said to be relevant.

The appellants did not share this view and caused their writ to issue against the respondents seeking a declaration that the respondents' tenancy had been lawfully determined and for consequential orders including vacant possession and damages. The appellants caused two summons to issue, one dated 4 April 1994 for an injunction restraining the respondents from obstructing the appellants

re-taking possession of the premises and for other related orders and the other dated 26 April 1994 seeking summary judgment under O. 14. The respondents in turn took out their summons seeking to restrain the appellants from interfering with the respondents' continued occupation of the premises until the trial of the action or further order. All three summons were heard together and all of them were dismissed with costs. The plaintiffs appealed and are the appellants here.

The learned Judge's grounds of decision, through no fault of the solicitors, have not been made available to us. Encik Romesh Abraham, Counsel for the respondents, contended that the Judge refusing to dispose of the issues summarily is the correct order to be made. He went on to submit that there appears to be a conflict in judicial opinion on the focal point in this case i.e., in respect of the effect of the option clause and accordingly, in any event, there ought to be, at least for that reason, a trial of the action. And that since possession is in issue, pending the trial, the *status quo* should be maintained and as, the respondents were in possession, they should be kept in possession.

Encik Robert Lazar says that there is no real conflict in the cases on the point and all the material needed for the determination of the relevant issues were before the Court and accordingly the matter was properly before the Judge for summary disposal and he should have adjudicated the issues and should have given the plaintiffs the orders that they had sought.

Encik Lazar went on to submit that the option clause as set out in the agreement here is similar to the option clause in *King's Motor (Oxford) Ltd. v. Lax* [1969] 3 All ER 665 and that on the strength of the judgment in that case which in his submission correctly stated the law, the learned Judge should have held that there was no concluded agreement between the parties and that it follows that the defendants were improperly holding over.

Now, *King's Motors* was considered and applied by the Supreme Court in *Zainal Abidin v. Century Hotel Sdn. Bhd.* [1987] 1 MLJ 236 at 238 where George Seah SCJ writing the judgment of the Court said:

> The option clause in the tenancy agreement reads:
>
> > The lessor will on the written request of the lessee made two (2) months before the expiration of the term hereby created grant to the lessee a further term of three (3) years from the date of the said expiration at a rent to be agreed upon but containing the same covenants and provisions with the exception of this clause **provided however** that the lessee shall not then be in a breach of any of the terms and conditions herein expressed to be observed or performed by the lessee. (Emphasis given)
>
> A similar clause came up for decision in *King's Motors (Oxford) Ltd. v. Lax & Anor.* Burgess VC held that an option in a lease for a further term "at such rental as may be agreed upon between the parties was, at least, where there was no relevant arbitration clause, void for uncertainty, in the absence of agreement

between the parties. *King's Motors* case was considered by Brightman J in *Smith v. Morgan.*

> In our opinion, an option clause (like the one here) in a lease does not give rise to any legal obligations on the part of either party unless and until the lessee gives notice in writing to the lessor, within the stipulated period, of his intention to extend the lease **and the parties have mutually agreed to the new rent.** Until these two conditions are satisfied the option clause, in our judgment, could not be legally enforced against the lessor. (Emphasis added).

The main issue in the instant case boils down to whether or not there was a concluded agreement between the parties in respect of the tenancy for a further term of three years.

The option clause in *King's Motor* was as follows:

> If the tenants shall be desirous of continuing the term hereby created for a further term of seven years at the expiration of the term hereby granted and shall six months before the expiration of the term hereby created give to the landlords a notice in writing of such their desire and shall pay the rent hereby reserved and perform the several stipulations herein contained and on their part to be observed and performed up to the termination of the term hereby created then the landlords will let the premises to the tenants for a further term of seven years **at such a rental as may be agreed upon between the parties hereto in writing prior to the expiration of the term hereby granted** and subject in all other respects to the same stipulations as are herein contained except this clause for renewal. (Emphasis added).

Encik Romesh Abraham suggested that this clause has to be distinguished from the option clause in the instant case in that there was a requirement in the *King's Motors* clause for agreement to be arrived on the rent for the new term **prior** to the expiration of the initial fixed term whereas in the option clause in the instant case no time limit is provided in the option clause for agreement to be arrived at on the rental.

I see no merit in this submission. The question is whether there was a concluded agreement. If no agreement had been arrived at on that most crucial element of the agreement, rent, there cannot be said to be a concluded agreement. That the parties might eventually agree on the rent does not make for a concluded agreement. The question "what if they never arrive at an agreement as to the new rent?" brings home the lack of merit in the submission.

Encik Abraham was, perhaps, on stronger ground in his submission that the Courts, if at all possible, would not allow a commercial agreement to go under for want of certainty. It was submitted that in an option clause of the type in *King's Motors* and in the instant case, the Court should imply that the parties had in mind that the rental for the new term should be "fair or reasonable rent" and if the parties cannot agree on such fair or reasonable rent the Court would decide for them what such rent is.

Counsel relied on *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng @ Tan Tien Chi & Anor.* [1995] 2 CLJ 713 in which Gopal Sri Ram JCA writing the main judgment of the Court of Appeal had said that *King's Motors* (referred to in the judgment as *"Lax"*) was wrongly decided.

Justice Gopal Sri Ram took the view that *King's Motors* was a controversial decision. He noted and disagreed with the view expressed in *King's Motors* that an option clause in a lease for a further term at such rental as may be agreed upon between the parties was in the absence at least of an arbitration clause void for uncertainty. Although the learned Judge himself went on to recollect that that judgment had been applied some 17 years later, by the Supreme Court in *Zainal Abidin v. Century Hotel Sdn. Bhd. (supra)* where, as has been seen, an option for a further term of three years "at a rent to be agreed upon" but otherwise upon the same terms and conditions with the exception of the option, clause was held not to give rise to any legal obligation until agreement had been arrived at on the rent, he thought that *King's Motors* should not be followed.

He said, at p. 735 of *Luggage*:

> In my opinion, the time has come to openly repudiate the decision in *Lax (supra)* rather than to make an attempt at circuitous logic by distinguishing it from case to case. For my part I would take the more direct approach and say that *Lax* was wrongly decided and that it should no longer be followed here.

What appears to have considerably influenced the learned Court of Appeal Judge into holding that *King's Motors* and a *fortiorari* even *Zainal Abidin* on the point, should not be followed was his understanding that "almost every case decided by an English Court after (*King's Motors*) has sought to distinguish it". Reference was made to and reliance placed by him on *Smith v. Morgan* [1971] 2 All ER 665; *Rothwell v. Wakeling* [1975] 29 p and CR 234; and *Trustees of National Deposit Friendly Society v. Beatties of London Ltd.* [1985]2 EGLR 59. It is to be noted that all these cases are pre - *Zainal Abidin.* However the learned Judge went on to say that he thought that the strongest possible indication that *King's Motors* was wrongly decided is to be found in the post-*Zainal Abidin* case, *Corson v. Rhuddlan Borough Council* [1990] 1 EGLR 20, 255; [1990] 59 P & CR 185.

With respect, an examination of those cases clearly demonstrates that the point to be taken from the English Courts distinguishing *King's Motors* from the cases that came before them after that case, is not that *King's Motors* was wrongly decided but that it could not be applied to those cases because on the facts they had to be distinguished from *King's Motors*. Also, an examination of those three cases referred to on the point in *Luggage*, I am afraid, does not suggest that the Judges there were indulging in "circuitous logic" to avoid an open repudiation of *King's Motors*. Let me now deal with each of those judgments and to some of the cases referred to in them.

In *Smith v. Morgan (supra)* a clause in a conveyance for the sale of certain land provided that should the vendor wish at any later date to sell certain adjoining land the "first option of purchasing that land should be given to the purchaser" at a figure to be agreed upon. The vendor tried to get out of giving the first option to the purchaser and sought to rely on *King's Motors*. Brightman J said at p. 1504 of the report (Emphasis provided)

> It seems to me that that *(King's Motors)* was a different case because there the agreement as to the rent was made an integral part of the option procedure. In the present case agreement as to price is no part of the offer which the vendor is bound to make. I therefore think that the vendor cannot rely on that decision as concluding this case. **However, I reject the purchaser's submission that the vendor, should she wish to sell, is bound to offer the property at market value or at such value as the Court may determine, as suggested by the points of counterclaim.**
>
> Paragraph 1 of sch. 2 to the conveyance states nothing whatever about market value and nothing about a reference to the Court, even if the Court were willing to accept such a reference. In my view it is implicit in para 1 of sch. 2 that a purchase, if it results from an offer, should be at a price acceptable to both parties. **On that basis it appears to me that para 1 can only mean one thing: that the obligation on the vendor, should she wish to sell, is an obligation to make an offer to the purchaser at the price and at no more than the price at which she is, as a matter of fact, willing to sell. If that offer is accepted by the purchaser, then there will be a purchase at a figure which has been agreed on. If the offer is rejected, then *cadit questio.***

The point made is that the offer had to be made. In respect of that it was not a case on uncertainty. And it seems to me that the portions of the quotation from *Smith v. Morgan* that I have provided emphasis, in effect reiterates the principle stated in *King's Motors.*

Trustees of National Deposit Friendly Society v. Beatties of Lord Ltd. (supra) was distinguished from *King's Motors* because unlike the position in *King's Motors,* in Trustees, the agreement had been substantially performed by one party. The tenant had given up its legal claim to continue with the tenancy of the ground floor and part of the basement of a shophouse in a commercial centre in London called High Holborn (that it had occupied as tenant for some 75 years) to enable the landlord to pull down the building and rebuild, upon there being given to the tenant an option to take up the tenancy of the ground floor and basement of the reconstructed building. The tenant exercised the option but in respect of the provisions in the agreement between the parties for ascertaining the new rent the Judge said, "Even if there is no uncertainty there is great obscurity and imperfect expression." He then proceeded to apply what in effect was an exception to the rule on which *King's Motors* was decided. The principle that was followed was as stated by Templemen LJ in *Sudbrook Trading Ltd. v. Eggleton* [1983] 1 AC 444 (and which was approved by the House of Lords when the case went to the House), and was in these terms:

> Where an agreement which would otherwise be unenforceable for want of certainty or finality in an essential stipulation has been partly performed so that the intervention of the Court is necessary in aid of a grant that has already taken effect, the Court will strain to the utmost to supply the want of certainty even to the extent of providing a substitute machinery.

Again we see a reiteration in no uncertain terms of the *King's Motors* principle followed by an explanation that justifies an exception to the rule. Reference was also made in *Trustees* to the headnote in the Lord Denning judgment in *British Bank for Foreign Trade Ltd. v. Novine Ltd.* [1949] 1 KB 623 which also reiterates the rule in *King's Motors* and explains that part performance provides an exception to the rules:

> The Court approved the statement of the trial Judge as to the law applicable to the first point: "The principle to be deduced from the cases is that if there is an essential term which has yet to be agreed and there is no express or implied provision for its solution, the result in point of law is that there is no binding contract. In seeing whether there is an implied provision for its solution, however, there is a difference between an arrangement which is wholly executory on both sides and one which has been executed on one side or the other. In the ordinary way, if there is an agreement to supply goods at a price "to be agreed', or to perform services on terms "to be agreed", then, although, while the matter is still executory, there may be no binding contract, nevertheless, if it is executed on one side, that is, if the one does his part without having come to an agreement about the price or the terms, then the law will say that there is necessarily implied, from the conduct of the parties, a contract that, in default of agreement, a reasonable sum is to be paid.

In *Rothwell v. Wakeling (supra)* Megarry J construed the provision that on due request the landlord would grant to the tenant "a lease of the demised premises for a rent and containing the like covenants and provisions as are herein contained with the exception of the present covenant for renewal, the lessor on the execution of such renewed lease to execute a counterpart thereof" as a covenant to renew on the same terms (including the same rent as in the previous term) but without the renewal clause. Justice Megarry explains:

> "the present covenant for renewal" and "such renewed lease" in the clause, showed that, although the clause as a whole was framed as a landlord's covenant to "grant" a lease "for a rent," the parties were treating the clause as being a covenant for renewal which must mean that the grant of a new lease for a rent was to be a renewal of the original lease, so that the rent would be the same as in that lease.

In so holding he was not running foul of what is really an elementary principle, that where an essential term in a contract is uncertain the Court will not rewrite the agreement for the parties. He was not saying that since the agreement was vague in respect of what the rent should be the Court will imply a fair rent or market rent. He was saying *per se* the words "a rent" makes for uncertainty but read in the light of the reference in the clause to "renewal of

the lease" it becomes clear that what was agreed was that there could be a renewal on the same terms. The effect of the provision for a renewal of a lease was discussed by Bruce J in *Lewis v. Stephenson* reference to which will be made later in this judgment.

As has been seen, *Corson v. Rhuddlan Borough Council (supra)* had great influence on Justice Gopal Sri Ram. There the option was to take up the new lease at a rent to be agreed but such rent not to exceed £1,150 per annum. The tenant in exercising the option offered to pay the maximum rent that the landlord could charge i.e. £1,150 per annum. The provision for maximum rent in *Corson* provides the machinery for ascertainment of the rent. There was nothing like that in *King's Motors*. Ralph Gibson LJ, who wrote the lead judgment in *Corson* pointed out the distinction. He said at p. 194 of the P & CR report:

> It is again, I think, not necessary for the Court to decide whether the decision in this *(King's Motors)* case was correct because the provision for a maximum rent is, in my judgment, a material distinction.

No doubt he then went on to say that "for his part he was inclined to the view that it *(King's Motors)* was, as Mr. George submitted, wrongly decided..." Such an "inclination" obviously was not meant to be a considered or conclusive opinion on the matter and for that reason and in any event was *obiter*.

Sir Ralph Gibson had relied on *Hillars & Co. v. Arcos* [1923] 147 LT 503 and on *Foley v. Classique Coaches* [1934] 2 KB 1. In *Hillars* it was a contract to buy Russian Softwood timber. The Court in construing the agreement to buy "22000 standards of softwood goods of fair specification over the season 1930" looked at the whole contract and the evidence given as to the course of the trade to hold that the term "fair specifications" was a term of art in the trade and that that provided the machinery for the Courts in case of resort being made to it, to ascertain the kinds, quality and size of the timber that had to be supplied.

Sir Ralph Gibson himself pointed out that the provision of a formula for the determination of the rent made all the difference. At page 190 of the report he said:

> Subject to the point raised in the respondent's notice, it seems to me that, without implication of the term for the rent to be a fair rent, the parties had not provided any formula for the determination of the rent to be agreed. Without some standard or formula, the Court could not regard the option as valid because determination of the rent would –
>
> > involve an adjustment between the conflicting interests of the parties which the parties have left unsettled and on which the Court is not entitled to adjudicate:

see per Lord Thankerton in *Hillas & Co. v. Arcos* [1932] 147 LT 503 at p. 513.

Again we see approbation being given to the rule expressed in *King's Motors.*

Similarly, in *Foley,* the defendant had agreed to buy all its petrol from the plaintiff at "prices to be agreed from time to time." The agreement went on to have an arbitration clause which could be invoked in the event of failure to agree on the price of the petrol. So, again there was the machinery to ascertain what would otherwise be unascertainable without the parties coming to an agreement. Sir Ralph Gibson pointed out at p. 193 of *Corson* that in *Foley,* the Court of Appeal:

> after consideration of the cases of *May and Butcher Ltd.* and *Hillas & Co. v. Arcos,* held that a term must be implied in the agreement that the petrol supplied should be of reasonable duality and be sold at a reasonable price, and that, if any dispute arose as to what was a reasonable price, it was to be determined by arbitration under the arbitration clause. There was therefore –
>
> > an effective and enforceable contract although as to the future no definite price had been agreed with regard to the petrol.

In *Foley* the arbitration clause made all the difference. Lord Justice Scrutton said in that case at page 10 of the report:

> In the present case the parties obviously believed they had a contract and they acted on it as if they had; they had an arbitration clause which relates to the subject matter of the agreement as to the supply of petrol, and it seems to me that the arbitration clause applies to an failure to agree as to the price.

And so it would seem that although Sir Ralph Gibson had said that he was inclined to the view that *King's Motors* was wrongly decided, such inclination is inexplicable both on principle and even on the judgments relied on by him each of which are consistent with the principle that unless the agreement provided the machinery or some formula that the Courts can utilise to ascertain what otherwise is unascertainable without the parties coming to an agreement, the option clause is bad for uncertainty.

The said judgment of Bruce J in *Lewis v. Stephenson* [1898] 67 QB 296 was quoted *in extenso* by Justice Gopal Sri Ram in dealing with uncertainty where one term of the contract was left for the parties to agree upon. In *Luggage* the material words in the option were "plus a further 2 years option" and in *Lewis v. Stephenson* "with the option of renewal" - Bruce J pointed out that the word renewed signified "to repeat, to put again in act". He quoted from Lord Abinger speaking of a renewed lease: "That is a renewal of the old lease and therefore in point of duration, coinciding with the former lease ... a lease containing the same terms." That diction of Lord Abinger and the view taken by Bruce J on the point no doubt were most apt in *Luggage* but has no application here where the option specifically leaves a crucial element of the new agreement to be re-negotiated.

In my respectful judgment the suggestion by Sir Ralph Gibson he was inclined to agree with Counsel that *King's Motors* was wrongly decided and justice Gopal Sri Ram's support of that opinion cannot be supported. It perhaps is no irrelevant to point out that I was on the coram of *Luggage* but had indicated there my reservation on the view taken in the main judgment of *King's Motors:*

> I had earlier, in expressing full accord and agreement with the judgment herein of Gopal Sri Ram JCA, mentioned a reservation. That is in respect of his holding that *King's Motors (Oxford) Ltd. v. Lax* [1969] 3 All ER 665; [1970] 1 WLR was wrongly decided. In *Lax,* it was held that an option in a lease for a further term :at such rental as may be agreed upon between the parties' was, in the absence of any arbitration clause, void for uncertainty. With respect, I think that the point is arguable and not only because it was after all followed by our Supreme Court in *Zainal Abidin v. Century Hotel Sdn. Bhd.* [1987] 1 MLJ 236.
>
> However, *vis-a-vis* the issues in the instant case, nothing turns on the view I take of *Lax.*

The High Court in Australia in *Booker Industries Pty. Ltd. v. Wilson Parking* [1982] 149 CLR 600 referred to the renewal clause in a lease which provided that renewal of the lease shall be at such rental:

> ... as may be mutually agreed between the lessor and the lessee and failing agreement then such rental as may be fixed by an arbitrator nominated in accordance with the provisions of clause 3.04(b) but in any event the rental shall not be less than the rental payable in the last year of the first term.

The judgment I think succinctly states the law on the point at p. 604 of the report:

> It is established by authority, both ancient and modern, that the Courts will not lend their aid to the enforcement of an incomplete agreement, being no more than an agreement of the parties to agree at some time in the future. Consequently, if the lease provided for a renewal "at a rental to be agreed" there would clearly be no enforceable agreement. On the other hand, it is also well-established that the parties to a contract may leave terms – even essential terms – to be determined by a third person: see the cases cited in *Godecke v. Kirwan.* In the present case, the lease itself provides the entire mechanism for determining the rental for the renewed term. There is no further agreement required of the parties. It is true that if they do agree upon that rental, then there is no occasion to resort to the independent mechanism that the lease provides. But, there being no such agreement, all that is required is that the president name a person to fix a figure being not less than the minimum rental operative during the original term.

A passage in the judgment of the Court of Appeal of British Columbia in *Re Express Powers Ltd. Bank of Nova Scotia 73 DLR* (4th) 400 at p. 403, is worth reproduction:

The principal question in the appeal is whether the renewal clause was void either for uncertainty or, what is fundamentally the same, as an agreement to agree. The obverse of that question is: If the renewal clause is not void, what does it mean?

What was said by this Court about interim agreements in *Griffin v. Martens* [1988], 27 BCLR (2d) 152 at p. 153, 10, ACWS (3d) 196 (CA), is equally true about leases:

> It is not the function of the Courts to set interim agreements aside for uncertainty because they contain a clause that is not precisely expressed. If such a clause has an ascertainable meaning, then the Courts should strive to find it. See *Hillas & Co. v. Arcos Ltd.* [1932], 147 LT 503 (HL), particularly per Lord Wright at p. 514, *Meehan v. Jones* [1981-82], 149 CLR 571 (Aus. HC); and *Wiebe v. Bobsien*, 64 BCLR 295, [1986] 4 WWR 270, 39 RPR 228, 20 DLR (4th) 475 (CA), particularly per Mr. Justice Seaton at p. 297. As long as an agreement is not being constructed by the Court, to the surprise of the parties, or at least one of them, the Courts should try to retain and give effect to the agreement that the parties have created for themselves.
>
> On the other hand, it is well-established that if all that the parties say is that they will enter into a lease at a rental to be agreed, no enforceable lease obligation is created.

Coming back to the instant case, we see that rental for the renewal period of the tenancy had to be agreed by the parties. The agreement for renewal was executory and there was no machinery formula for the Court to ascertain the rent if the parties could not come to an agreement on the rent. On authority and on principle the agreement to agree is bad for uncertainty. The Court cannot and should not make a bargain for the parties. There was need for a trial to come to that conclusion.

King's Motors restates an elementary principle and is not controversial. Further it and the principle it stated having been given approbation by the Supreme Court in *Zainal Abidin*, the principle of *stare decisis* makes it mandatory for even the Court of appeal to apply it.

The two other points relied on by Encik Romesh Abraham can now be dealt with. The first of this is his contention that it was implied that the appellants should have done all that was reasonably necessary to ensure that the parties reach an agreement. I agree with Encik Lazar that that is asking the Court to add yet another clause to the agreement. In any event neither the parties nor the Court may insist that the parties come to an agreement. You may take the mule to the water but you cannot make it drink it.

The second point made was that the appellants were estopped from taking the position that there will be no renewal of the tenancy. Reliance was placed on the contention that the respondents had represented to and the appellants had appreciated that the respondent had in mind a five-year depreciation of

their equipment and which had resulted in the inclusion of the option clause in the tenancy agreement, that the appellants had said that it was not their policy to change car park operators and that the appellants had required the respondents to upgrade their equipment and propose a better system of flow of traffic. These contentions do not do away with or even water down the requirement that agreement had to be arrived at on rental before there is a renewal. The contentions do not provide a basis for relying on estoppel. All that can be said at best for the respondents is that they believed and went about their business on the basis of such belief that there would be a renewal. That *per se* does not provide an estoppel in respect of such renewal and certainly not for the requirement that agreement be arrived at on rent. There has not been the sort of representation by or on behalf of the appellants in respect of which the respondents acted to their detriment that entitles the respondents to rely on estoppel.

The appeal has to be allowed with costs. Consequently there should be judgment for the plaintiffs in terms of prayers, 1, 2 and 3 of the O. 14 application which is their summons-in-chambers dated 26 April 1994 and is at p. 40 of the Record of Appeal. There will be no order on the plaintiffs other Summons-in-Chambers dated 4 April 1994 which is at p. 34 of the Record of Appeal save that the costs thereof shall be paid by the defendants.

Siti Norma Yaakob JCA:

I have had the benefit of reading the draft judgment of my learned brother VC George, JCA and I concur with the reasons expressed in his judgment when allowing this appeal with costs. I also endorse the other consequential orders:

(1) that there be judgment for the appellant in terms of prayers 1, 2 and 3 of the O. 14 summons-in-chambers dated 26 April 1994 appearing at p. 40 of the Record of Appeal,

(2) that there be no order on the appellant's summons-in-chambers dated 4 April 1994 appearing at p. 34 of the Record of Appeal save that costs of it will be paid for by the respondent to the appellant;

(3) that the deposit be refunded to the appellant.

Reported by Cindy Chan